IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 222 OF 1986.

Ganpat Bhagu Surve,
since deceased by LRs.
1(a) Pandurang Ganpat Surve,
Aged: 48, Occ.:Agriculture.
1(b) Raghu Ganpat Surve,
Aged: 42, Occ.: Agriculture.
1(c) Vitthal Ganpat Surve,
Aged: 36, Occ.: Agriculture,
all residents of Jamgaon,
Post: Shere, Tal. Mulshi,
Dist. Pune.
1(d) Smt.Rahibai Baban Chandere,
Age: 44, Occ.: Housewife,
resident of Shere, Tal.Mulshi,
Dist. Pune.
1(e) Smt.Taibai Baban Gujar,
Age: 40, Occ.: Housewife,
residing at Vegare, Tal.
Mulshi, Dist. Pune.
1(f) Smt.Jaibai Maruti Pawar,
Age: 38, Occ.: Housewife.
residing at Shere, Tal.
Mulshi, Dist. Pune.
1(g) Smt.Sitabai Bandu Jadhav,
Age: 36, Occ.: Housewife,
residing at Khechare,
Tal.Mulshi, Dist.Pune.
1(h) Smt.Chandrabhaga Ganpat Surve,
Age: 65, Occ.: Housewife,
residing at Jamgaon,
Tal.Mulshi, Dist.Pune.
1(i) Chitaman Ganpat Surve,
Age: 36, Occ.: Service,
residing at House No.47-A,
Worli, Bombay-25. .... Appellants.
(Org.Defendants.)

Versus.

Shripati Somaji Chandare,
Age: 55 years, Occ.: Agriculture,
residing at Shere, Taluka Mulshi, ... Respondent
Dist. Pune. (Org.Plaintiff.)

Shri R.V.Govilkar with Shri Sarang Aradhye for the Appellants.

Shri A.R.Joshi for the Respondent.

CORAM : ABHAY S. OKA, J.

DATED : 6th April, 2005.

ORAL JUDGMENT.

1. This Second Appeal was admitted on 25th March 1986. While admitting the Second Appeal substantial question of law was not specifically framed. Though substantial question of law was not specifically framed, it appears that this Court felt that substantive question of law was involved and therefore, the Second Appeal came to be admitted. When the Second Appeal was called out for hearing on 31st March 2005, I had indicated to the learned Advocates appearing for the parties the substantial question of law which I propose to frame by exercising powers under proviso to sub-section (5) of section 100 of the Code of Civil Procedure, 1908. The said substantial question of law is as under:

(i) Whether the Appellant had perfected his title to the suit property by adverse possession especially when the Respondent/Plaintiff admitted in the plaint that the Appellant was in

possession of the suit property as a trespasser ?

2. I have heard the learned Counsel appearing for the parties on the above substantial question of law on 1st April 2005. With a view to appreciate the submissions made by the learned Counsel appearing for the parties, it will be necessary to refer to the facts of the case in brief.

3. The suit was possession was filed by the Respondent/Plaintiff in respect of the suit agricultural land more particularly described in paragraph 1 of the plaint. The case of the Respondent/Plaintiff is that he purchased the suit property from the Defendant by registered sale deed. The case is that the Defendant thereafter submitted an application to the Mamalatdar alleging that he was the agricultural tenant in respect of the suit land. Proceedings were initiated under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948 and the proceedings were decided in favour of the Respondent/Plaintiff. Therefore, suit for possession came to be filed by the Respondent.

4. The Appellant/Defendant contested the suit by filing

written statement. The Defendant did not dispute the execution of the sale deed in favour of the Respondent/Plaintiff. According to the Defendant, he purchased the suit property from its erstwhile owner one Tapare on 27th August 1955. His case is that for purchasing the suit land he was in need of some amount and therefore, he borrowed amount from the Respondent/Plaintiff and at the instance of the Plaintiff he executed sale deed in respect of the suit land. He submitted that the sale deed was bogus and without consideration.

5. The trial Court dismissed the suit filed by the Respondent/Plaintiff. The trial Court held that the Appellant/Defendant has failed to prove that the sale deed executed by him in favour of the Respondent/ Plaintiff was sham and bogus and was not to be acted upon as such. After accepting the title of the Respondent/Plaintiff, the trial Court held that the suit was barred by limitation.

6. An Appeal was preferred by the Respondent/ Plaintiff to the District Court. The Appeal was heard by the learned Joint District Judge. The learned Joint District Judge framed points for determination on the

basis of the plea of adverse possession and answered the same against the Appellant/Defendant. By the impugned Judgment and Decree dated 20th August 1985, the Appeal was allowed and the Decree for possession was passed in favour of the Respondent/Plaintiff.

7. Shri Govilkar, the learned Counsel appearing for the Appellant submitted that from the averments made in paragraph 6 of the plaint, it is established that the Appellant/original Defendant was in unauthorised possession of the suit property from the year 1966 and therefore, possession of the Appellant/Defendant was hostile and the knowledge of the Respondent/Plaintiff is reflected from the averments made in the plaint. He submitted that in paragraph 6 it is stated that the original Plaintiff was in illegal possession of the suit property even prior to the year 1966. He, therefore, submitted that even assuming that there was no specific plea of adverse possession in the written statement, the said plea was established even from the averments made in the plaint. He has invited my attention to the various Judgments. He relied upon the Judgment of a learned Single Judge of the Mysore High Court reported in AIR 1870 Mysore page 318 (Annu alias Kallappa v/s.Sheshu Gundappa). He has also placed reliance on

another Judgment of the learned Single Judge of the Lahore High Court reported in AIR 1937 Lahore, page 602 (Raja Har Indar Singh v/s. Shiv Ram). He also placed reliance on a decision of the learned Single Judge of the Orissa High Court reported in AIR 1973 Orissa page 180 (Dula Bewa and others v/s. Balunki Padhan). Lastly he placed reliance on the decision of the learned Single Judge of this Court reported in 2001(3) All MR page 16 (Laxmibai Laxman Sankhe since deceased through her hris & LRs. v/s. Damodar Ramji Sankhe.). He submitted that right from the year 1955, the original Plaintiff did proclaim himself to be the owner to the knowledge of the original Plaintiff and that is the reason why the original Defendant has been described by the Plaintiff as trespasser. He submitted that the trial Court has rightly dismissed the suit filed by the original Plaintiff. He submitted that the Appellant's title to the suit land is perfected by adverse possession, and the suit was rightly dismissed as barred by law of limitation by the trial Court. He lastly submitted that the sale deed executed by the Defendant in favour of the Plaintiff was dated 27th August 1956 and atleast from that date the possession of the Appellant became adverse.

8. Before referring to the various Judgments relied upon by Shri Govilkar it is necessary to refer to the pleadings. In the plaint it is asserted that after execution of the sale deed in favour of the Respondent/Plaintiff, proceeding was initiated at the instance of the Defendant for declaring the sale transaction as illegal. The Additional Tahsildar in the year 1959 held that the suit transaction was legal. The proceedings under section 32(G) of the Bombay Tenancy and Agricultural Lands Act, 1948 was initiated at the instance of the Defendant as he claimed to be an agricultural land in respect of the suit land. The proceedings ended by a Judgment dated 10th July 1970 by which it was held that there was no relationship of tenant and landlord between the Defendant and the Plaintiff. Reliance is also placed on one of the decisions of the Tehsildar by which the name of the Respondent was ordered to be mutated in the revenue records. The case made out in paragraph 6 of the plaint is that taking undue advantage of the afroesaid proceeding which was pending, the Defendant illegally continued to occupy the suit land. Written Statement is filed by the Defendant. One of the contentions raised in the Written Statement is that the decision of the Tahsildar dated 28th February 1974 is illegal and the

consequent mutation entry is also bad in law. While dealing with the averments made in the paragraph 6 of the plaint, the Defendant denied that he is in possession of the suit land as a trespasser. It is specifically contended that the Defendant was never a trespasser in the suit land. Except for vaguely stating that the suit was barred by limitation, there is no plea raised in the written statement regarding the perfection of title adverse possession.

9. It will be necessary to refer to a recent decision of the Apex Court reported in 2004(1) S.C.C. page 551 (V.Rajeshwari (smt.) versus R.C.Saravanabava). In paragraph 17 of the decision the Apex Court held thus:

> "17. So is the case with the plea as to adverse possession over the suit property taken by the defendant in his written statement. The plea has been held not substantiated and rightly so. The plea is too vague. Earlier the defendant, claiming himself to be an adopted son of one of the predecessors-in-title of the plaintiff, had filed a suit for partition claiming half a share therein. Thus, he was canvassing his claim as a co-owner in

p[ossession. How and at what point of time he started prescribing hostile title, was for him to plead and prove, which he has utterly failed in doing. This plea of adverse possession raised by the defendant is devoid of any merit and cannot be coountenanced."

Thus the Apex Court held that for substantiating the plea of adverse possession, the Defendant must plead how and when and at what point of time he started perfecting his hostile title. In another recent decision reported in (2003) 7 S.C.C. page 481 (Deva (dead) through LRs. v/s. Sajjan Kumar (dead) by LRs.) the Apex Court held that mere long possession of the Defendant for a period of more than 12 years without intention to possess suit land adversely to the title of the Plaintiff and to the latter's knowledge cannot result in acquisition of title by prescription. In a Judgment reported in (2004) 10 S.C.C. 779 (Karnataka Board of Wakf v/s. Government of India and others) the Apex Court had occasion to consider the law relating to plea of adverse possession. Paragraph 11 of the said decision is relevant which reads thus:

"11. In the eye of the law, an owner would

be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive hostile and continued over the statutory period. (See S.M.Karim v. Bibi Sakina, Parsinni v. Sukhi, and D.N.Venkatarayappa v. State of Karnataka). Physical fact of exclusive possession and animus possidendi to hold as owner in exclusion to the actual owner are

> the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession."

The settled law on the subject appears to be that a person pleading adverse possession has no equity in his favour and when he is trying to defeat the rights of the true owner, it is for him to substantiate his case of adverse possession. In paragraph 12 of the same decision, the Apex Court held that the plea based on title and adverse possession are mutually inconsistent

and the later does not begin to operate until the former is renounced.

10. The suit filed by the Respondent-Plaintiff is based on title and is governed by Article 65 of the Limitation Act, 1963. Article 65 prescribes period of limitation of 12 years from the date on which the possession of the Defendant has become adverse. That is the reason why the Apex Court held that the adverse possession has to be pleaded clearly. In the facts of the present case it is an admitted position that the plea of adverse possession is absent in the written statement filed by the Defendant. The plea of adverse possession is pressed into service to defeat the suit filed by the Respondent/Plaintiff for possession on title. Therefore, it was for the Defendant to establish that his possession become adverse to the knowledge of the Plaintiff from a particular point of time so that he can establish that the suit is not filed within the period of 12 years from that point of time. In the absence of specific plea as regards the adverse possession in the written statement, it was not open for the Appellant/Defendant to agitate the said plea without there being any pleadings. The Plaintiff has asserted in the plaint that after having failed to succeed in the

proceedings under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948, the Defendant illegally continued to be in possession. Therefore, this assertion in the plaint cannot prove his animus possidendi to hold the suit land to the exclusion of the real owner. Reliance is placed by Shri Govilkar on the case of Anna alias Kallappa (supra) is totally misplaced. The learned Single Judge of the Mysore High Court was dealing with the applicability of section 14 of the Limitation Act. In the facts of the case before the learned Single Judge there was no dispute between the parties that the plea of adverse possession was raised by the Defendant. Similarly, in the face of the law laid down by the Apex Court the decision of the learned Single Judge of the Allahabad High Court and the Lahore High Court will not help the Defendant.

11. The order passed by the Mamalatdar in the proceedings under the said Act of 1948 dated 10th July 1970 has been exhibited in the record of the trial Court. The said order itself shows that at least from the year 1960 the Defendant was claiming to be in possession of the suit land as an agricultural tenant. Thus at least in the year 1970 even according to the case of the Defendant, his possession was referable to a

lawful title. The suit is filed in the year 1974. Thus the bar of Artilce 65 of the Limitation Act is not at all attracted.

12. After considering the oral and documentary evidence on record, the Appellate Court has negatived the plea of adverse possession pleaded by the Appellant/Defendant. Once the Appellant/Defendant failed to plead and establish his plea of adverse possession, the original Plaintiff who is the real owner must succeed in getting possession. That is the reason why the decree for possession has been passed by the trial Court. There is no merit in the Appeal. The Appeal is dismissed with no order as to costs.

Judge.